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FEB 12 1969
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No. 931

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Petitioner,

v.

STATE TAX COMMISSION OF MISSOURI, HUNTER PHILLIPS, Chairman, CARL E. DAVIS and J. RALPH HUTCHISON, Members, J. R. TOWSON, Secretary, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

REPLY BRIEF FOR PETITIONER

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Respondents in their Brief in Opposition to Burlington's Petition make three basic points: (1) that "the method of valuation used by the Commission is authorized and directed by Missouri law" (Br. in Opp. 7); (2) that the "real position of petitioner [is] that

its theory of assessment should have been used to the exclusion of the Commission's theory" (Br. in Opp. 5-6); and (3) that the rule of *Norfolk & Western Ry.* v. *Missouri State Tax Comm'n,* 390 U.S. 317 (1968), "is not applicable here [in] that the rule applies to allocation formulas" (Br. in Opp. 8). The respondents' first point is obvious and is not disputed by the Burlington; their two other points are incorrect.

I

Without question the Missouri Supreme Court sustained, as a matter of State law, the Tax Commission's method of assessing the railroad's property. The Burlington has not argued and could not argue before this Court that the Commission or the Court below erred in its interpretation of State law. The Burlington's position here is rather that, in approving as a matter of State law the method of assessment used by the Commission, the Missouri Supreme Court has disregarded the limitations upon the State's taxing authority that are set forth in the due process clause of the Fourteenth Amendment, as recently articulated in *Norfolk & Western Ry.* v. *Missouri State Tax Comm'n, supra.*

II

The respondents misstate the issue when they say that "what is really involved in this case is which of two methods or approaches to the valuation of petitioner's distributable property should be used by the Missouri State Tax Commission" (Br. in Opp. 4) and that "the real position of petitioner [is] that its theory of assessment should have been used to the exclusion of the Commission's theory" (Br. in Opp. 5-6). At no

point before the Missouri State Tax Commission, the Missouri Courts or this Court (see Petn. 9) has the Burlington taken the position that Missouri is constitutionally bound to use the Burlington three-factor formula in assessing the railroad's property. Instead, it has been the position of the Burlington throughout these proceedings that its suggested method of valuation is both an accurate way to assess railroads and a reliable and convenient check upon the method used by Missouri. The statement of the Burlington's counsel before the Missouri State Tax Commission makes the Burlington's position on this matter crystal clear:

> "The point we would like to make is that we would like to have the Commission use the unit method because we think it is accurate and we think you would arrive at a better and more realistic and reasonable assessment. On the other hand, we do not contend that you are required to use it.
>
> "The next point is that even if you don't use it, whatever system you do use, we think that the unit method approach furnishes a very reliable check as to whether the valuation reached by the Commission, by the method it follows, lies within the reasonable boundaries of an acceptable and realistic assessment.
>
> "So we think we can prove that your figure is too high, it ought to be considerably lower." (R. 44-45).

There are any number of ways in which the Missouri Commission could have modified its own approach to the valuation of the Burlington to take into account the real value of the Burlington's property as reflected in its evidence. For example, in calculating the "eco-

nomic obsolescence factor," the Commission could have made a rational comparison between the Burlington's actual return on the book value of its operating property and some postulated desirable return, instead of merely reducing the assessment by a factor derived by subtracting the former figure from the latter. (See Petn. 6-7, 16-17). Or the Commission could have reexamined the arbitrary $20,000 a mile assessment set on main-line track and the equally arbitrary figure of $60 an acre used for assessing right-of-way.

In short, the Burlington did not at any point suggest that the Commission must follow the Burlington's method of assessment but instead argued only that the Commission was bound to modify its method to take into account the Burlington's evidence of real value.

III

In arguing that the rule of the *Norfolk & Western* case is not applicable here because in that case the State's mileage formula "resulted in an allocation to Missouri of property that had no tax situs in Missouri" whereas in the present case the petitioner "has never in this case, and does not now, contend that Missouri is taxing property not having a tax situs in Missouri" (Br. in Opp. 8), respondents ignore the substance of the claim at issue in both *Norfolk & Western* and this case.

The respondents admit that "it is settled that a State may impose a property tax upon its fair share of an interstate transportation enterprise" and that this "fair share may be regarded as the value, appropriately ascertained, employed in the taxing State, including a portion of the intangible or 'going con-

cern' value of the enterprise." (Br. in Opp. 8). Both the *Norfolk & Western* case and this case are concerned with determining whether Missouri has in fact taxed more than its "fair share" of railroad property. If it has taxed more than that fair share, Missouri's tax inevitably falls upon property located outside the State in violation of the due process clause.

In *Norfolk & Western* the mechanical application of the Missouri mileage formula resulted in taxation of more units of rolling stock than were actually in the State. In the instant case, the application of several mechanical and arbitrary formulas to the Burlington has resulted in Missouri's taxing a greater portion of the Burlington's system than in fact lies within Missouri. In both cases, therefore, the State has taxed values actually lying outside Missouri and has exceeded the limitations imposed upon it by the due process clause. Accordingly, the principle of the *Norfolk & Western* case—that "any formula used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing State," 390 U.S. at 325—is fully applicable here.

* * * *

Finally, we simply note that with respect to the second question presented—whether the Burlington was deprived of a fair hearing because the Commission acted upon evidence outside the record—the respondents state only that the Burlington had the opportunity to present its theory of assessment and that the Commission's method was fully explained. The respondents do not suggest, and indeed they are precluded from doing so by the record, that there was any evidence of value introduced before the Commission to sustain its arbitrary and irrational assessment.

CONCLUSION

For the reasons stated herein and in the petition for certiorari, the petition should be granted.

Respectfully submitted,

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